IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 469 of 1999
and
SPECIAL CIVIL APPLICATION No 7220 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHARTERED ACCOUNTANTS ASSOCIATION
and
GUJARAT INSTITUTE OF CIVIL ENGINEERS & ARCHITECTS
Versus
UNION OF INDIA

Appearance:
MR SN SOPARKAR and MR MIHIR H JOSHI for Petitioners
MR ASIM J PANDYA for Respondent No. 1
RULE SERVED for Respondent No. 4

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE M.S.SHAH

Date of decision: 27/12/2000

COMMON CAV JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In these petitions under Article 226 of the Constitution, the Chartered Accountants' Association and the Gujarat Institute of Civil Engineers & Architects have challenged the constitutional validity of Section 88 of the Finance Act, 1997 and Section 116 of the Finance (No. 2) Act, 1998 levying service tax on the Consulting Engineers and Architects and also on the practising Chartered Accountants.

The Gujarat Institute of Civil Engineers & Architects is a registered association of Engineers and Architects of Gujarat. It has about 2600 members and Special Civil Application No. 7220/99 is filed on their behalf. Petitioner Nos. 2 and 3 in the said petition are Consulting Engineers and past/present office bearers of the said association.

The Chartered Accountants' Association is an association of 1000 practising Chartered Accountants in the State of Gujarat. Special Civil Application No. 469/99 is filed by the association on behalf of its members. Petitioner No. 2 in the said petition is a practising Chartered Accountant.

2. Service tax was introduced by the Finance Act, 1994. Chapter V thereof contains the scheme and provisions relating to the tax. Section 66 imposed service tax at the rate of 5% of the value of taxable services provided to any person by the person responsible for collecting the service tax. Taxable service was defined in Section 65(1) to include certain services provided by stockbroker, telegraph authority and general insurer. The persons providing the services were liable to recover the tax and pay the same to the Central Government under Section 68 of the Act.

The ambit of the levy was widened by the Finance Act, 1997 and section 65 was substituted so as to include a wide variety of services including under clause (g) services provided to a client by a consulting engineer. A few other services were also covered under the Act. It appears that representations were made against such levy by persons carrying on different professions/callings. Section 116 of the Finance Act, 1998 substituted Section 66 of the Finance Act, 1994. While a few services covered by the 1997 Act were excluded from the purview of

the service tax, a few more services were included. Services provided by the Architects, Interior Decorators, Chartered Accountants, Cost Accountants and Company Secretaries were covered by the levy of tax. It appears that representations were made by the Associations representing various professions/callings. The respondent authorities thereafter issued notifications dated 7.10.1998 and 16.10.1998 clarifying which services of practising Chartered Accountants are exigible to service tax and exempting such taxable services provided by the practising Chartered Accountants/Company Secretaries/Cost Accountants in their professional capacities.

3. While admitting the petitions, the Court granted ad-interim relief restraining the respondents from enforcing in any manner the provisions of Section 88 of the Finance Act, 1997 and Section 116 of the Finance Act, 1998 in so far as they levy service tax on services provided to the respective clients by consulting engineers, architects and practising chartered accountants.

It appears that the Court was informed that the provisions levying service tax on the professions have been challenged before various High Courts including Madras High Court, Calcutta High Court and Rajasthan High Court where interim stay against levy of service tax was granted.

In response to the Rule, the affidavit in reply has been filed by the Assistant Commissioner, Central Excise, Service Tax Cell, Ahmedabad in each petition.

4. At the hearing of these petitions, Mr Soparkar for the Chartered Accountants Association and Mr Mihir H Joshi for the Gujarat Institute of Civil Engineers & Architects have challenged the constitutional validity of the service tax levied on the services rendered by the above professionals on the following grounds :-

4.1 What is being taxed by the impugned levy is services being rendered by the three categories of professionals. Profession by itself is nothing but rendering services in the respective professional field. It is exclusively within the competence of the State legislature to levy tax on professions as per Entry 60 in List II (State List) in the VIIth schedule to the Constitution. The relevant provisions of the Finance Act, 1997 and 1998 enacted by Parliament, therefore, suffer from the vice of lack of legislative competence as

the Parliament has no power to levy tax on professions.

4.2 The impugned provisions mete out discriminatory treatment in as much as the same services being rendered by the non-qualified persons are not subjected to tax, but only the services being rendered by the professionals are subjected to tax. Similar services rendered by non-qualified persons in the field of engineering, architecture and accountancy are not subjected to tax. The classification between qualified persons and non-qualified persons is irrational, discriminatory and violative of Article 14 of the Constitution.

4.3 The levy will cost the client 5% more than what it would cost when the same services are rendered by a non-qualified person who is not covered by the levy. As such the client would prefer such other non-qualified persons. The impugned levy, therefore, violates the freedom of profession guaranteed under Article 19(1)(g) of the Constitution.

4.4 The impugned provisions are even otherwise arbitrary as they adversely affect the carrying on of the profession by Engineers, Architects and Chartered Accountants, in as much as there is no onus cast on the recipient of services to pay tax and the entire burden of recovery of payment is thrust on the persons who provide services with harsh penal consequences in the event of an involuntary default.

4.5 While bringing all the concerned professional services in the net of service tax, it has placed the services rendered by the goods transport operator, outdoor caterer and shamiana contractor etc. out of the tax net without specifying any reason for their earlier inclusion and the present exclusion. Therefore also, the impugned levy is arbitrary and discriminatory.

5. Mr Ashim Pandya, learned counsel for the Union of India has made the following submissions :-

5.1 The tax is not on the profession concerned, but on the services rendered to the client. The levy is not covered by Entry 60 in List II of the VIIth Schedule to the Constitution but it is within the legislative competence of the Parliament to make such an enactment. Under Article 248 of the Constitution read with Entry 97 of the Union List, the Parliament has exclusive power to make any law with respect to any matter not enumerated in

the concurrent list and the State List. Service tax is neither mentioned in the State list nor in the Concurrent list.

5.2 Service sector contributed 46% of the gross domestic product but it was not covered by the tax net earlier. The excise duty is a tax on manufacture of goods and sales tax is a tax on sale of goods. Both these taxes are indirect taxes as the expenditure is passed on to the person purchasing the goods. However, in absence of any taxing statute in respect of services, a large number of activities were not subjected to tax although such activities were an important part of the national economy. The persons rendering such services were only subjected to income tax covered by entry 83 in List I. The persons manufacturing goods pay excise duty on the process of manufacturing goods and pay sales tax on sale of the goods and are also liable to pay income tax on the income earned by them. However, the professionals rendering services for remuneration and similarly other persons rendering service in a large number of fields for remuneration were only subjected to professional tax by the State Legislature under Entry 60 in List II and that too subject to the maximum limit of Rs.2500 per annum as imposed under Article 276(2) of the Constitution. Such tax was, however, on their profession/trade/ calling/employment irrespective of the fact whether they were earning any income or not. The Parliament, therefore, decided to tax the services being rendered by professionals and by other trades and callings. Such tax on services is, therefore, absolutely distinct and separate from the tax on profesion/trade/calling/employment. Service tax is an indirect tax which the person carrying on profession/trade/calling can pass on to the person obtaining the services. On the other hand, the tax on profession being levied by the State legislature under Entry 60 in List II is a direct tax on the person himself.

5.3 The persons qualified and the persons not qualified are two separate classes and, the classification has a rational nexus with the object sought to be achieved. Hence, there is no hostile discrimination. In Addition Advertising vs. Union of India, 1998 (1) GLR 317, a similar petition filed by the advertising agents challenging the levy of service tax has been dismissed by a Division Bench of this Court and the levy of service tax has been upheld.

5.4 The services rendered by the chartered

accountants are materially different from those being rendered by other accountants who render merely arithmetical accounting which would not require special skill. The accountants other than chartered accountants are not technically qualified for making/providing financial accounting / tax planning techniques etc. It is only the chartered accountants alone who by virtue of their specialized education are in a position to provide the specialized services. Even otherwise, the services of accounting rendered by chartered accountants is qualitatively different from such services rendered by other persons.

The affidavits also controvert various averments made in the petitions and the contentions raised therein.

6. CONSTITUTIONAL AND STATUTORY PROVISIONS :

Art. 248. Residuary powers of legislation - (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Art. 276. Taxes on professions, trades, callings and employments - (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two thousand and five hundred rupees per annum:

(3) The power of the Legislature of a State to make laws aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to

taxes on incomes accruing from or arising out of professions, trades, callings and employments.

SEVENTH SCHEDULE

List I - Union List

Entry 82 - Taxes on income other than agricultural income.

Entry 84 - Duties of excise on tobacco and other goods manufactured or produced in India except ... ...

Entry 97 - Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II - State List

Entry 54 - Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I)

Entry 60 - Taxes on professions, trades, callings and employments.

Chapter V - Service Tax

Sec. 65. In this Chapter, unless the context otherwise requires, -

(5) "architect" means any person whose name is, for the time being, entered inthe register of architects maintained under section 23 of the Architects Act, 1972 (20 of 1972) and also includes any commercial concern engaged in any manner, whether directly or indirectly, in rendering services in the field of architecture.

(13) "consulting engineer" means any professionally qualified engineer or an

engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering.

(31) "practising chartered accountant" means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 (38 of 1949) and includes any concern engaged in rendering services in the field of chartered accountancy.

(48) "taxable service" means any service provided -

(g) to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in or or more disciplines of engineering.

(p) to a client, by an architect in his professional capacity in any manner;

(s) to a client, by a practising chartered accountant in his professional capacity, in any manner;

Sec. 66 Charge of service tax -

(1) & (2) .. ..

(3) With effect rom the date notified under section 88 of the Finance Act, 1997 (26 of 1997), there shall be levied a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (k), (l), (m), (n) and (o) of clause (48) of Section 65 and collected in such matter as may be prescribed.

(4) With effect from the date notified under section 116 of the Finance (No. 2) Act, 1998,

there shall be levied a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (p), (q), (r), (s), (t), (u), (v), (w), (x), (y) and (z) of clause (48) of section 65 and collector in such manner as may be prescribed.

Valuation of taxable services for charging service tax.

Sec. 67. For the purposes of this Chapter, the value of taxable services,-

(f) in relation to service provided by a consulting engineer to a client, shall be the gross amount charged by such engineering from the client for advice, consultancy or technical assistance in any manner in one or more disciplines of engineering;

(o) in relation to the service provided by an architect to a client, shall be the gross amount charged by such architect from the client for services rendered in professional capacity in any manner;

(r) in relation to the service provided by a practising chartered accountant to a client, shall be the gross amount charged by such accountant from the client for services rendered in professional capacity in any manner'

Payment of service tax

Sec. 68 (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall

be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

7. Since the submissions made on behalf of the petitioners are essentially based on certain decisions, we proceed to discuss them first.

7.1 In Currie vs. Commissioners of Inland Revenue, (1921) 2 King's Bench Division 332, the Court of Appeal laid down the following definition of the profession :-

"Whether a profession is exercised or not ... ... the fact that the particular man is a member of an organized professional body with a recognized standard of ability enforced before he can enter it and a recognized standard of conduct enforced while he is practising it. I do not for a moment say it settles the matter, but if I were deciding a question of profession I should attach some important to that particular feature".

It is, therefore, submitted that profession and service are one and the same thing. There can not be a profession which does not involve rendering service.

The Court was concerned with the question whether the appellant was carrying on a profession or a business. The appellant was carrying on the business of the Income Taxpayers' Appeal Agency and doing the original work of an accountant. He was not a chartered accountant, nor a member of any organized professional body. He had, however, from time to time employed a chartered accountant as a member of his staff. The appellant himself was specialized in income tax, assisting persons in the preparation of their income tax returns and claims for repayment of income tax, and advised taxpayers on general income tax and excess profits duty questions. He was paid by way of fixed fees for his accountancy work and for a portion of his income tax and excess profits duty work. For his services, in connection with income tax, etc. and particularly as regards claims to relief from income tax or for repayment of income tax, the appellant had frequently charged a percentage on the amounts discharged or recovered from the revenue authorities. The appellant's contention that he was

carrying on a profession was negatived by the Tax Commissioners and in appeal, the Court of Appeal applied the above test and held that the appellant was not carrying on a profession.

We do not see how this decision advances the petitioners' case. There is no dispute about the fact that the petitioners are associations whose members carry on the professions of chartered accountants/consulting engineers/architects, as the case may be.

7.2 Reliance is also placed on the following observations made by the Bombay High Court in Sukharam vs. Nagpur Corporation, AIR 1964 Bom. 200:-

> "Any activity which can justly be called a commercial activity, must imply some investment of capital and the activity, must run the risk of profit or loss. ... ... A lawyer's profession is not a kind of profession which can be said to be carried on as profession of commercial nature. It is not a commercial activity and the very nature of the work is such that it is incapable of being of a commercial nature. An activity to be a profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristic. ... ... It is the personal skill, intelligence, study, integrity which is the core of a professional activity."

The Bombay Shops and Establishments Act required compulsory registration of a commercial establishment where commercial activity is carried on. The Court was called upon to examine the question whether the office of a person carrying on the profession of a lawyer was a commercial establishment. It was in this context that the Court gave a finding that the profession of an advocate is not one which could be said to partake of the character of a commercial activity or commercial transaction. Certain attributes of the profession distinguishing it from business were cited in the judgment. It was pointed out that a lawyer performs functions which are in the nature of regal function and a lawyer is part and parcel of the whole administration of justice. It is not only in his office or in his chamber that a lawyer carries on his profession. A major part of his duty requires him to attend Courts and defend cases of his clients, to attend to other tribunals where permitted and to present his client's interest in several

places outside his chamber or office room. It cannot, therefore, be predicated that the profession of law or that of an advocate is carried on only in his office.

It is thus clear that the Court was examining the question whether a lawyer's office could be considered to be a commercial establishment or not. All the observations relied upon by the learned counsel for the petitioners were made in that context and the Court was not at all required to examine the controversy whether the tax on services rendered by a professional is different from the tax on profession.

7.3 Reliance is placed on the decision in M/s. L.M. Chitale vs. Labour Commissioner, AIR 1964 Mad.130 for contending that it cannot be said that a profit motive underlies the carrying on of a profession or an occupation and that, therefore, there is a material difference between carrying on a profession on the one hand and carrying on occupation, trade, or business on the other hand.

The facts in this case were also similar to the facts in the Bombay case. In this case, the office of a chartered architect was sought to be brought within the purview of Madras Shops and Establishment Act and the Court upheld the contention of the chartered architect that the tax was meant to cover shops and establishment which are associated with the carrying on of trade or commerce and cannot take in establishments where professional services are rendered. It is true that the Court observed that the expression "services are rendered to customers" in the definition has to be construed as services rendered to customers in the carrying on of trade or business", but this decision cannot be construed as laying down that services rendered by a professional is the same thing as a profession. Since the controversy was quite different, the observations made in the context of applicability or otherwise of Shops and Establishments Act cannot be permitted to carry too far.

7.4 Reliance is also placed on the decision of the Punjab High Court in Waliati Ram vs. Rupar Municipality, AIR 1960 Punjab 669 wherein it was held that the items in the Legislative List have to be given most liberal interpretation and have to be construed in their widest amplitude and the rule of interpretation that the words should be read in their ordinary, natural and grammatical meaning has no applicability to constitutional enactment conferring legislative powers. Hence, Entry 60 in the State list conferring power on the State Legislature to

tax persons who are carrying on professions, trades, callings and employments must be given most liberal interpretation and the words in the entry must be construed in their widest amplitude. The said entry is broad based and comprehensive.

In this case, what was challenged was the notification of the Punjab Government under the Punjab Municipal Act levying tax on every person carrying on a trade, profession, calling or employment in the area subject to the authority of the municipal committee. In pursuance of the notification, certain sums of money were recovered from three plaintiffs-employees of a private limited Company. The plaintiffs filed suits for the refund of the amounts so paid and sought an injunction prohibiting the Municipal Committee from recovering any further tax on the plea that the Municipal Committee had no authority to impose any tax on persons in private employment. The suits as well as the appeals were dismissed. The second appeals were carried to the Punjab High Court.

It was in the context of the controversy raised by the plaintiffs who were in employment of a private company that the Court was called upon to interpret the words "professions", "trades", "callings" and "employments" and the Court quoted the meaning of these words as set out in "Words and Phrases", Permanent Edition, Vol. 34, Page 201 and in the Oxford English Dictionary Vol. VIII Pages 1427-28. The Punjab High Court then observed as under :-

"It is very difficult to hold that the framers of the Constitution while using these words were using them as terms of art. The object of the entry is to enable the State Legislature to tax persons, who are carrying on any `professions', `trades', `callings' and `employments'. The words under scored (in this report with " " marks Ed.) above have not any definitive meaning distinct from that of the other. These four words do not seem to be used in a mutually exclusive sense. These words overlap one another and appear to have been used by way of abundant caution in order to make these provisions broad based and comprehensive. None of these words has any particular technical meaning and even if they had any definitive significance the object of putting them all together is to ensure that no particular category of persons is being

eliminated."

The Court then concluded that employment under a private employer was also covered by Entry 60 in List II.

The decision, therefore, did not deal with the controversy involved in the present case whether tax on services rendered by a person carrying on profession/tade/calling/employment is different from the tax on profession/trade/calling/employment.

7.5 The learned counsel for the petitioners have also relied on the decision of the Bombay High Court in Kisan Supdu Ingale vs. Bhusawal Borough Municipality, AIR 1966 Bom. 15 in support of the same contention that there cannot be any profession without service. The Bhusawal Municipality decided to impose tax on professions, trades, callings and employments by virtue of the powers conferred by the Bombay Municipal Boroughs Act, 1925. An employee of the Municipality challenged the levy of the said tax on the ground that the Municipality was not competent to levy a tax on any employment in the nature of "service", in which a person is employed to work for another. His contention was that the word "employments" should be construed ejusdem generis with the other words mentioned in Entry 60 in List II of Schedule VII to the Constitution and, therefore, it should mean "such employments which are akin to or in the nature of professions, trades and callings". The Court rejected the contention and upheld the principle laid down by the Punjab High Court in Waliati Ram vs. Rupar Municipality, AIR 1960 Punj.669.

The learned counsel, however, sought to rely on the following sentences in para 4 of the said judgement::-

"Employment therefore is also a word of wide import and the object of including this word also in the relevant entry in the Constitution evidently was to bring within the scope of this entry every activity or occupation, in which a person engages in order to earn a livelihood, whether it be trade, business, profession or service. In any case the word "employments" would include service or occupations, in which a person works for another and in which there is relationship of employer and employee. A tax on service, in which the petitioner is employed, could therefore be imposed under entry 60

referred to above."

The learned counsel for the petitioners relied on the underlined sentence to contend that the tax under Entry 60 also included the tax on service.

It appears to this Court that the underlined sentence is sought to be quoted out of context. What the Court meant by the words "the tax on service" was "the tax on employments". The facts giving rise to the controversy and the discussion in the judgement including the entire paragraph quoted herein above clearly indicate that the discussion was in the context of the controversy whether the employees of the Municipality were liable to pay tax on employments. The word "service" was, therefore, used as a synonym for "employment".

7.6 Reliance was also placed on the decision of the Apex Court in Kamta Prasad vs. Ex. Officer, Ballabgarh, AIR 1974 SC 685. The Punjab Professions, Trades, Callings and Employment Taxation Act, 1956 imposed liability on persons who carried on trade, followed profession or calling or who were in employment to pay tax in respect of such profession, trade, calling or employment at rates specified in the schedule. The measure of tax depended upon the income slab. The parties were to pay Rs.250 per annum to the State by way of professional tax. The Act continued to be applicable to the State of Haryana and also to the Union Territory of Chandigarh.

The Panchayat Samiti, Ballabgarh levied professional tax at the maximum rate of Rs.200/- per annum as per the impugned notification under the Panchayat Samitis and Zilla Parishad Act, 1961. The tax was levied at different rates on different slabs of income. The appellant's contention before the Supreme Court was two fold. There was double taxation -- one by the State under the Punjab Professionals, Trades, Callings and Employment Taxation Act, 1956 and another by the Panchayat Samitis and Zilla Parishad Act, 1961. Article 276(2) provided Rs.250 p.a. as the upper limit of total taxes which could be imposed on professions, trades, callings and employments. The professional taxes under the two separate Acts aggregated to Rs.450 per annum. The second challenge was that the tax on profession was connected with income. Hence, such a tax could be levied only by Parliament.

The Apex Court repelled both the challenges. It firstly held that the upper limit of Rs.250 (now Rs.2500) per annum stipulated by Article 276(2) is in respect of the total amount payable to the State or to any one Municipality, District Board, Local Board or other local authority. The word "or" is used in a disjunctive sense. Hence, both the State or any Municipality can tax separately to the limit imposed by the Article. The Apex Court also negatived the contention that the professional tax imposed by the Panchayat was a tax on income. The Court observed as under :-

> "A tax on income can be imposed if there is income. A tax on profession can be imposed if a person carries on a profession. Such a tax on profession is irrespective of the question of income."

Thus, the Apex Court has clearly laid down that the tax on profession can be imposed if a person carries on a profession and that such a tax is irrespective of the question of income. This clearly means that if the Parliament levies tax on the services rendered by the professional by reference to the gross receipts received by a professional for the services rendered by him, it is not a tax on profession because the professional tax is a tax levied on a person carrying on any profession irrespective of his income. This decision, therefore, far from assisting the petitioners, destroys their argument that tax on profession and the tax on the services rendered by the professional are the same thing.

7.7 The learned counsel for the petitioners relied on the decision in Bankim Chandra vs. Distirct Panchayat Officer, AIR 1965 Calcutta 463. In this case, the West Bengal Panchayat Act levied tax on land and building. The measure of tax was aimed at the actual profits or income from the land and building. The challenge to the levy of tax was on the ground that the tax was levied on non-agricultural income from land and building for which the State legislature was not competent to levy. The Calcutta High Court following the observations of the Federal Court in Ralla Ram's case, AIR 1949 FC 81 negatived the contention by holding that the real distinction between these two Acts seems to be that whereas the Income-tax Act purports to tax the true income, there is no such pretence in the West Bengal Panchayat Act which uses the annual value merely for the purpose of valuation of the property to be taxed.

It was, therefore, submitted that the impugned

levy of tax on services rendered by a professional with reference to the gross receipts for the services rendered is really a tax on the activity of the professional rendering his services and, therefore, merely because the measure of tax is the gross receipts, the tax does not cease to be a tax on the profession. Hence, the levy of this tax would have been valid only if it had been levied by the State legislature.

This decision does not carry the petitioners' case any further because the tax on the gross receipts for the services rendered by a person carrying on a profession is very much different from the tax on the profession as discussed hereinafter.

7.8 In Kantilal v. Palitana Municipality, AIR 1955 Saurashtra 90, the Court sought to make a distinction between the tax on calling and the tax on entertainments by observing that the true test is to ascertain the incidence of the tax. If the incidence falls on the person because he is engaged in the business of providing the entertainment for profit, it is a tax on his calling; but if the incidence of the tax falls on the particular entertainment irrespective of whether the person providing the entertainment follows that calling or not, then it is a tax on the entertainment and falls within item No. 62 of the State list. If the tax is to be paid on a cinema show irrespective of whether it is given by a professional exhibitor or by one following a different calling i.e. by a charitable society to raise funds for a charity, it is obvious that the tax can only be regarded as a tax on entertainment and not a tax on calling.

It is, therefore, vehemently submitted by the learned counsel for the petitioners that since the tax is sought to be levied by the impugned Act only on the services rendered by professionals/engineers/ architects/chartered accountants and not on similar services being rendered by others in the field, the tax is levied on the profession and not on the services.

This submission is inter connected with the plea of discrimination and will be considered a little later.

7.9 It was further contended that the Parliament cannot be permitted to have recourse to the residuary Entry 97 in List I unless and until it satisfies the Court that the subject matter of the legislation in question does not fall in any of the entries in the State list or in the Concurrent list. It was further submitted

that the residuary entry is not entitled to the rule of liberal interpretation and wide amplitude. Strong reliance has been placed on the principle laid down by the Apex Court in Vijay Kumar Sharma vs. State of Karnataka, (1990) 2 SCC 562 and in Federation of Hotel & Restaurant vs. Union of India, AIR 1990 SC 1637 for contending that recourse to the statutory power under Entry 97 in List I should be the very last refuge and would be available only if any other entries in the State and concurrent lists do not cover the topic and that where the competing entries are an entry in List II and entry 97 in List I, the entry in the State List must be given a broad and plentiful interpretation.

Reliance was also placed on the following words of caution sounded by Chinnappa Reddy, J. in International Tourist Corporation vs. State of Harayana, AIR 1981 SC 774 at Pp.777-78)

> "..... Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State legislature must be clearly established. Entry 97 itself is specific that a matter can be brought under that entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those lists. In a Federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State legislature. That might affect and jeopardise the very federal principle. The federal nature of the constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected......."

The learned counsel for the petitioners have also relied on the following observations made by a Constitution Bench of the Apex Court in Second G.T. Officer, Mangalore vs. D.H. Hazareth, AIR 1970 SC 999:-

> "The sovereignty of Parliament and the Legislatures is a sovereignty of enumerated

> entries, but within the ambit of an entry, the exercise of power is a plenary as any legislature can possess, subject, of course, to the limitations arising from the Fundamental Rights. The entries themselves do not follow any logical classification or dichotomy. As was said in State of Rajasthan vs. S. Chawla, (1959) Supp 1 SC 904 = (AIR 1959 SC 544) the entries in the lists must be regarded as enumeratio simplex of broad categories. Since they are likely to overlap occasionally, it is usual to examine the pith and substance of legislation with a view to determining to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. Therefore, to find out whether a piece of legislation falls within any entry, its true nature and character must be in respect to that particular entry. The entries must of course receive a large and liberal interpretation because the few words of the entry are intended to confer vast and plenary powers. If, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation."

It is, therefore, submitted that in the instant case competing entries are Entry 60 in List I and Entry 97 of List I. The entry in the State list must be given a broad and plentiful interpretation and applying the said rule of interpretation laid down by the Apex Court, the Court must hold that power of the State legislature to levy tax on the profession includes the power to levy tax on the services rendered by the professional, since carrying on a profession is nothing but rendering services to the client.

8. While the above argument as set out in the immediately preceding sub-para appears to be prima facie attractive, it presupposes that the distinction between the tax on services rendered by a professional and the tax on the profession on the one hand is just like the distinction between the professional and the services being rendered by the professional. The Constitution, however, recognizes this distinction clearly by specifically providing in Article 276(3) that the power of the Legislature of a State to make laws aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way

the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

Moreover, we find considerable substance in the submissions of Mr Ashim Pandya, learned counsel for the Union of India that just as the Parliament has the power to levy tax on manufacture of goods as per Entry 84 in the Union list, the Parliament also has the power to levy tax on the services being rendered by a professional. We also find considerable substance in the argument of Mr Pandya that if the tax on a trade or calling would also include the power to tax the transactions being entered into by a person carrying on any trade or calling, there would not have been a separate entry (Entry 54 in List II) to confer the power to levy tax on sale of goods. The fact remains that a trader carrying on his business of buying and selling goods and subjected to tax under Entry 60 in the State list is also liable to pay taxes on the sale or purchase of goods under Entry 54 in the State list. Thus, the two taxes are separate and distinct and the two cannot be merged into each other merely because a person liable to pay tax under Entry 60 in the State List is also liable to collect and pay tax on sale of goods under Entry 54 in the said List is one and the same person in both the cases.

9. We find that the true scope of Article 248 and Entry 97 in List I can be better appreciated after taking into consideration the following weighty observations of the Apex Court in Karnataka State vs. Union of India, AIR 1978 SC 68 (70 to 72):-

"Our Constitution may be lengthy and considerably more comprehensive and elaborate than Constitutions of other countries. Nevertheless, to expect its contents to be so all embracing as to necessarily specify and deal with every conceivable topic of legislation on all constitutional matters exhaustively, with sufficient particulars, so as to leave no room for doubt as to what could be meant by it - as though a topic of legislation had to be stated, with necessary particulars, like a charge to an accused person - is to expect the humanly impracticable if not the impossible. And, to build an argument founded on the supposed reasonableness of such an expectation and some loosely drafted comprehensive definition of either "constitutional law" or a "Constitution",

> to convince us that what is not so specified and identifiable as a subject of legislation, given in the Constitution, must be necessarily prohibited at least as a topic of ordinary legislation, although it may become permissible by an amendment of the Constitution, by an addition to it, appears very unrealistic to us.
>
> ... ... The most that could be expected from the human foresight of Constitution-makers is that they should provide for that residual power of legislation which could cover topics on which, consistently with the constitutional framework, Parliament or State legislatures could depending on the constitutional pattern, legislate even though the legislation may not be easily assignable to any specific entry. Such a provision our Constitution-makers did make.
>
> Item 97 corresponds to the residuary legislative powers of Parliament under Art. 248 and gives effect to Art. 248. ... ... the Constitution-makers cannot always mention and exhaust every conceivable topic. We think that it is in order to meet precisely such a situation that Art. 248 read with Entry 97 was inserted. hence, we think that Art. 248 read with Entry 97 of list I will fully cover Section 3 of the Act even if Item 94 of List I does not."

The Court also sounded a note of caution against applying the principle "Expressio Unius" rule to exclude what does not fall within an expressly provided legislative entry. That maxim has been aptly described as a "useful servant but a dangerous master". The limitations or conditions under which this principle of construction operated are frequently overlooked by those who attempt to apply it.

It is thus clear that before a Parliamentary legislation can be held to be beyond its legislative competence, the Court must hold that there is an express and specific bar or a bar by necessary implication against the Parliament enacting a law on the topic in question.

10. We find that the following decisions of the Apex Court throw considerable light on the controversy at hand, in case they are not treated as concluding the controversy.

10.1 In Western India Theatres Ltd. vs. Cantonment Board, Poona, AIR 1959 SC 582. Under Section 100 of the Government of India Act, 1935 read with entry 50 in Schedule VII thereto the provincial legislature had the power to make law with respect to "taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". The relevant provisions of the Cantonments Act and the Bombay Municipal Boroughs Act empowered the Cantonment Board/Municipal Borough to levy tax on the licensee of a cinema theatre on each show of the film exhibited by him. The levy was challenged on the ground that the owner/licensee of the cinema theatre was already subjected to the tax on profession/trade/calling and that the tax on the cinema show was also a tax on the calling of the cinema owner/theatre licensee because it is while carrying on his calling that the owner/licensee exhibits cinemas.

The Apex court negatived the challenge and held that the impugned tax was not a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax. A lawyer has to pay a tax or fee to take out a license irrespective of whether or not he actually practises. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the license chooses to do so. The impugned tax is a tax on the act of entertainment resulting in a show.

10.2 The decision in Federation of Hotel & Restaurant vs. Union of India, AIR 1990 SC 1637 is in the same vein.

In this case, the challenge was to the levy of tax under the Expenditure Tax Act, 1987 enacted by the Parliament. The Act envisages a tax at 10 per cent ad valorem on `chargeable expenditure' incurred in the class of Hotels wherein "room-charges" for any unit of residential accommodation are over Rs.400 per day per individual. The "chargeable-expenditure" included expenditure incurred or payments made in such class of hotels in connection with the provisions of accommodation, residential or otherwise, food or drink etc. The challenge was on the ground that entry 62 in List II conferred exclusive power on the State legislature to levy tax on luxuries and Entry 54 in List II empowered the State to levy tax on the sale of goods. Hence, the expenditure tax and tax on the sale of goods

were covered by the entries in the State list; there was nothing left for the Parliament to tax.

In the context of the said controversy, which was akin to the present one, the Apex Court observed as under::-

"Indeed, the law `with respect to' a subject might incidentally `affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor General in Council v. Province of Madras, AIR 1945 PC 98) in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

"....The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as it there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale......."

11. An analysis of the aforesaid decisions cited by either side makes it clear that even though there may be some overlapping between profession and service as sought to be suggested by the learned counsel for the petitioners, tax on services rendered by a professional is quite different and distinct from the tax on the profession. To elaborate, the professional tax which an architect, consulting engineer or a practising chartered accountant pays is a tax for the privilege of having the right to exercise that particular profession. However, the service tax which each of the aforesaid professionals pays is the tax which he has to pay each time he renders services for remuneration. The tax is thus on the services rendered for remuneration. On the other hand,

the professional tax is required to be paid for the privilege of having the right to exercise the profession whether or not the preson actually chooses to exercise the profession in a given year or not. The liability to pay professional tax would remain irrespective of the fact whether a person actually renders services or not or whether the services are rendered for remuneration or not. On the other hand, the service tax is to be levied only when the services are rendered by a concerned person for remuneration. The entire edifice of the petitioners' case that the service tax is a tax on the profession must, therefore, fail. Consequently, the reliance on entry 60 in State List must also fail. There being no other entry in the State List or Concurrent List which could possibly be referred to for the purpose of levying service tax, the legislative competence for enacting this law must be traced to Article 248 read with entry 97 in the Union List.

12. As regards the challenge levelled by the petitioners on the ground of discrimination that persons possessing qualifications of a Chartered Accountant, Engineering and Architecture are subjected to tax on the services rendered by them, but non-qualified persons rendering similar services are left out, the same cannot be accepted. It cannot be said that the qualified persons in the field of engineering, architecture or chartered accountants on the one hand and non-qualified persons rendering services in the respective fields on the other hand belong to same class or they are all similarly situate. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law.

12.1 In Jaipur Hosiery Mills Pvt. Ltd. vs. State of Rajasthan, AIR 1971 SC 1330, the Supreme Court has laid down the principle that in matters of taxation the Legislature possesses the large freedom in the matter of classification. Thus wide discretion can be exercised in selecting persons or objects which will be taxed and the statue is not open to attack on the mere ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally and cannot be justified on the basis of a valid classification that there would be a violation of Article 14.

12.2 Again in State of Gujarat vs. Sri Ambika Mills Ltd., AIR 1974 SC 1300, the Apex Court quoted with approval the following scintillating observations made by American Judges and Jurists :-

"Statutes are directed to less than universal situations. Law reflects distinction that exist in fact or at least appear to exist in the judgment of legislators - those who have the responsibility for making law fit fact. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the near, logical models of the mind. Classification is inherent in legislation. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic."

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restrain if not judicial deference to legislative judgment, the legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self-limitation can be seen to be the path of judicial wisdom and institutional prestige and stability."

12.3 In the case of Federation of Hotel & Restaurant (Supra), the Court observed that the basis of classification under the Expenditure Tax Act cannot be said to be arbitrary or unintelligible nor as being without a rational nexus with the object of the law. A hotel where a unit of residential accommodation is priced at over Rs.400/- per day per individual is, in the legislative wisdom, considered a class apart by virtue of the economic superiority of those who might enjoy its custom, comforts and services. This legislative assumption cannot be condemned as irrational. It is equally well recognized that judicial veto is to be exercised only in cases that leave no room for reasonable doubt. Constitutionality is presumed.

13. In the instant case also, it cannot be gainsaid that it is easier for the State to identify the qualified professionals and to tax services being rendered by them as against the difficulty in tracing non-qualified persons rendering services in similar fields. It cannot

be gainsaid that persons with qualifications in the professional field rendering their services in the fields of accountancy, engineering and architecture are likely to charge higher fees than non-qualified persons rendering their services in such or similar fields. It cannot, therefore, be said that the classification between the qualified professionals like chartered accountants, engineers and architects on the one hand and non-qualified persons rendering their services in similar fields on the other hand is unreasonable or that the classification has no reasonable nexus with the object sought to be achieved in collection of revenue.

14. Coming to the decision in Kantilal vs. Palinta Municipality (AIR 1955 Sau. 90) relied upon on behalf of the petitioners, the Court finds that the principle laid down therein is not good law in view of the subsequent pronouncements of the Apex Court. A Constitution Bench of the Apex Court has held in Western India Theatres vs. Cantonment Board, AIR 1959 SC 582 that where the legislature has the power to make law with respect to tax on luxuries, entertainments, amusements etc., there is no reason to confine the operation of the entry only to taxes on persons receiving the luxuries, entertainments etc. Therefore, the fact that the tax was levied on the giver of the entertainment would not take it out of the ambit of the aforesaid item (item No. 50 in List 2 of Schedule VII to the Government of India Act, 1935).

"The entry contemplated the luxuries, entertainments and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments or amusements and both may, with equal propriety, be made amenable to the tax." The decision of the Saurashtra High Court in Kantilal vs. Palitana Municipality, AIR 1955 Sau. 90 must, therefore, be treated as impliedly overruled.

It is thus clear that the tax is on the services being provided. The nature of services provided by a qualified chartered accountant, qualified consulting engineer or a qualified architect is bound to be qualitatively higher than the services rendered by non-qualified persons in the same or similar fields. Hence, when the legislature has made a classification between the services rendered by a qualified professional and the services rendered by a non-qualified person in similar or same filed, the classification is not hit by Article 14. The services per se are not taxed. It is

the services rendered by the professional which are taxed. Merely because it is the professional who is required to collect and pay the tax, it does not mean that the tax is on the professional.

15. In view of the above discussion, contention Nos. 3, 4 and 5 must also fail as the legislature is always held to have wide discretion to choose the objects for taxation, as already held by the Apex Court in Jaipur Hosiery Mills Pvt. Ltd. vs. State of Rajasthan (Supra) and in State of Gujarat vs. Sri Ambika Mills Ltd. (Supra).

16. For the aforesaid reasons, there is no merit in any of the contentions raised on behalf of the petitioners and, therefore, the petitions are hereby dismissed. Interim relief stands vacated.

Rule is discharged. There shall be no order as to costs.

(D.M. Dharmadhikari, CJ)

(M.S. Shah, J.)

At this stage, the learned counsel for the petitioners pray that since the interim stay was operating in favour of the petitioners till now and petitions are dismissed today, the members of the petitioner-associations may be given some time to pay up the amount of service tax and to comply with the other formalities prescribed by or under the statute without the respondents taking any penal action for the delay in compliance or in payment.

In the facts and circumstances of the case, we find that the request is reasonable. We accordingly direct the respondents that if the members of the petitioner-associations comply with the requisite formalities prescribed by or under the statute and pay the arrears of service tax on or before 28.2.2001, the respondent shall not take any penal action.

(D.M. Dharmadhikari, CJ)

(M.S. Shah, J.)

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